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Issue date: 16Jan2002

Case No: 1992-LHC-03641
OWCP No. 10-31916

In the Matter of

JAMES WHITFORD,

Claimant,

v.

BUSH OCEANOGRAPHICS EQUIPMENT CO.,

Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

DECISION AND ORDER ON THE MOTIONS OF THE PARTIES AND DECISION AND ORDER ON REMAND - AWARD OF BENEFITS

On April 28, 1998, the undersigned issued a Decision and Order - Award of Benefits on the claim of James Whitford ("Claimant") pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (herein after referred to as either "LHWCA" or the Act), and the regulations issued under 20 C.F.R. §702.101 *et seq.* Regulation section numbers mentioned in this Decision and Order refer to that Title.

Benefits were awarded upon my finding that the claim was covered by the Act, that the statute of limitations provision of §13 did not bar the claim, that the injury to the Claimant's arm arose out of the course and scope of employment, that there was timely notice of injury to the Employer, that the Claimant suffered from a temporary, total disability, and that the

Claimant was entitled to an average weekly wage of $26.92 per week. Benefits were denied on the issue of the Claimant's alleged work-related back injury as I found the facts did not support invocation of the 20(a) presumption in regards to that injury. The Employer, Bush Oceanographic Equipment Co., and the Claimant both appealed portions of my decision to the Benefits Review Board [the Board].

On August 18, 2000, the Board issued a Decision and Order, remanding my Decision and Order of April 28, 1998, to the Office of Administrative Law Judges for further consideration consistent with its opinion. In its decision, the Board affirmed my findings that the claim was timely filed pursuant to §13(d), that timely notice of injury was given pursuant to § 12(d), that the Claimant was not entitled to the presumption of §20(a) in regards to his alleged work-related back injury, and that the Claimant was temporarily and totally disabled due to his forearm injury. Whitford v. Bush Oceanographic Equipment Co., BRB Nos. 99-1183 & 99-1183A (August 18, 2001). The Board remanded this case, however, on my findings that the claim was covered by the Act and on my calculation of the Claimant's average weekly wage. Id. Specifically, on the issue of coverage, the Board ordered I first reconsider whether the Employer's "Member of the Crew" defense was barred by the doctrines of judicial estoppel and/or collateral estoppel. The Board directed that if I find that defense is not barred, then I am to consider whether the Employer's vessel was "in navigation" at the time of the Claimant's injuries in light of the United States Supreme Court holding in Chandris v. Latsis, 515 U.S. 347 (1995). Id. Furthermore, the Board instructed that, if on reconsideration, I find the claim is not covered by the Act, then counsel for the Claimant would not have achieved success in her prosecution and thus, the Employer will not be liable for Claimant's attorney fee. Id.

An order was entered in this case on July 9, 2001, giving the parties 60 days in which to submit briefs and/or motions regarding the issues to be considered on remand. The Claimant, through counsel, on August 2, 2001, filed the following three motions: 1.) A motion seeking to expedite these proceedings on remand; 2.) A motion for recalculation of the Claimant's average weekly wage; and 3.) A motion for summary decision disallowing the Employer's "Member of the Crew" Defense. An Order to Show Cause was issued on August 10, 2001, directing the Employer to show cause why the Claimant's motions should not be granted. After receiving two extensions of time in which to respond to

the Show Cause Order, the Employer filed responses, objecting to the Claimant's motions, on September 6, 2001. Additionally, on September 6, 2001, the Employer filed a motion to strike the Claimant's motion for summary decision. The Claimant filed reply briefs to the Employer's objections and motion on September 13, 2001.

The Findings of Fact and Conclusions of Law contained in my previous Decisions and Order are all adopted in this Decision and Order on the Motions and Decision and Order on Remand except to the extent that any findings made in that previous Decision are inconsistent with the findings and conclusions expressed in this Decision and Order. Based on a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, case law and the Board's order, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History:

The Claimant alleges he sustained an injury to his arm while working for the Employer in February 1989. In May 1989, he filed a Workers' Compensation claim with the State of Michigan Department of Labor. The application for a hearing on that claim was withdrawn on October 31, 1989, after the matter was resolved by agreement of the parties[1]. (Cl. Ex. B)[2]

On March 5, 1991, the Claimant filed a complaint in the Saginaw, Michigan Circuit Court seeking recovery under the Jones Act, 46 U.S.C. §688. (Cl. Ex. C) In this complaint, the

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[1] In brief, the Claimant avers this voluntary withdrawal request was made after the parties agreed the case was properly covered by the Jones Act. I can find nothing in the record that specifically supports the argument that the withdrawal request was made after agreement of the parties. However, the rationale behind this withdrawal is not necessary to the resolution of this case.

[2] In this Decision and Order "Er. Ex." refers to the Employer's exhibits, "Cl. Ex." refers to the Claimant's exhibits, and "ALJX" refers to the Administrative Law Judge's exhibits.

Claimant alleges he was a "seaman", as defined by the Act, at the time of his injury with the Employer. (Cl. Ex. C) In the Employer's answer to this complaint, dated April 23, 1991, the Employer argued that the Claimant was not in fact functioning as a seaman at the time of injury for purposes of the Jones Act. (Cl. Ex. D) On January 9, 1992, the Employer filed a motion before the state circuit court seeking summary disposition of the case on the grounds the Claimant was not a seaman and thus, the Jones Act did not apply. (Cl. Ex. F) In its brief in support of the motion, the Employer argued, pursuant to the case of Boyd v. Ford Motor Co., 948 F.2d 283 (6th Cir. 1991), that a vessel must be "in navigation" at the time of the alleged injury for the Jones Act to apply. (Cl. Ex. F) As the ship the Claimant was injured on was not "in navigation", as defined by the Boyd Court at the time of injury, but in winter dry dock, the Jones Act did not apply and the case should be dismissed. (Cl. Ex. F)

The Circuit Judge, Patrick M. Meter, held a hearing on the Employer's motion for summary disposition on February 3, 1992. (Cl. Ex. G) The Claimant's counsel did not file a brief in opposition to that motion. However, Claimant's counsel did appear at the hearing and asked the circuit judge to find that the Claimant ***was not*** a seaman. (Cl. Ex. G) The Employer's counsel also appeared at the hearing and argued the position taken by the Employer in its brief in support of the motion, i.e., that the Claimant was not a seaman. In ruling on the motion, Judge Meter stated the following:

> The Court will, at the request of both counsel[s] rather than enter a pro forma determination, take at least some time and make a – necessary findings to preserve the record.

After reviewing the exhibits, the brief of the Employer, the arguments of the parties, and the then controlling case law, Judge Meter found the Jones Act did not apply to the claim and granted the Employer's motion for summary decision. (CL. Ex. G) An Order granting summary disposition was entered by the circuit court on February 14, 1992. (Cl. Ex. H)

Subsequent to the dismissal in circuit court, in March 1992, the Claimant re-filed a claim for benefits with the Workers' Disability Compensation Bureau of the Michigan Department of

Labor. In its answer to this complaint, the Employer averred the Claimant "was employed . . . as a seaman at all pertinent and applicable times." (Cl. Ex. I) Furthermore, the Employer specifically stated the Michigan Bureau of Workers' Disability Compensation Bureau lacked jurisdiction over the Claimant's alleged claim because that claim was subject to the Jones Act. (Cl. Ex. I)

On May 29, 1992, the Claimant filed the present claim for benefits under the LHWCA. In response to the claim, the Employer's counsel sent a letter dated June 24, 1992, to Office of Workers' Compensation Programs (hereafter referred to as OWCP) Claims Examiner, James Stamper. (Cl. Ex. K) In that letter, the Employer's counsel states that the LHWCA does not apply to Mr. Whitford's injury because Mr. Whitford was a "member of the crew" at the time of injury. As a "member of the crew" the Claimant was excluded from coverage of the LHWCA pursuant to 33 U.S.C. §903 (a)(1).

On August 12, 1993, the Claimant filed an Application for Leave to File a Late Appeal with the Michigan Court of Appeals. (Cl. Ex. L) With this appeal, the Claimant sought review of the summary disposition order of the state circuit court. In the Employer's answer to the Claimant's application, the Employer stated:

> The lower court found no genuine dispute of material fact that the vessel in question was not "in navigation" at the time of the alleged incidents, and therefore, Plaintiff/Appellant was not a seaman. This judicial determination that Plaintiff was not a seaman, as a matter of law, is binding upon the Plaintiff and the Defendant in any subsequent tribunal.

Furthermore, in its brief in support of the answer, the Employer stated,

> [t]he case law involving facts and issues directly on point hold that if a plaintiff was not a "seaman" for purposes of instituting an action under the Jones Act or

> general maritime law, then his remedies are limited to those available under the Longshore and Harbor Workers' Compensation Act.

The Michigan Court of Appeals denied the Claimant's application on November 5, 1993. (Cl. Ex. O)

Employer's Motion to Strike:

As grounds for its motion to strike, the Employer avers that the documentation offered by the Claimant in support of its motion for summary decision, consisting of nineteen exhibits labeled A through S, contains a number of exhibits not part of the record. Specifically, the Employer states that Exhibits B thorough G, I, J, and L through N were not part of the record when it was closed by the undersigned at the conclusion of the hearing in this matter. The Employer cites to 29 C.F.R. §18.54(c) which states in pertinent part, "once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. §18.54(c). The documents now offered by the Claimant, the Employer maintains, were readily available at the time of the hearing and to allow submission of such evidence now would prejudice the Employer as it has not had an opportunity to rebut such evidence with additional documentation of its own.

Additionally, the Employer argues that several of the new exhibits offered by the Claimant have not been properly submitted pursuant to 29 C.F.R. §18.48. That provision states "in case any portion of the record in any proceeding or civil . . . action is offered into evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the administrative law judge directs otherwise." 29 C.F.R. §18.48. The Employer contends that the copies of documents related to other, earlier proceedings, and now offered by the Claimant are not true copies as at least one of the documents has some handwritten notations in the margins.

I begin by noting that the Employer's objection based upon §18.54 is without merit. My order of July 9, 2001, specifically permitted briefs and/or motions on remand. Consequently, any party of record was permitted, based upon that order, to make

any necessary motion in this case, including a motion to offer additional evidence into the record. Implicit within the Claimant's original motions for summary decision is a motion to accept into the record the exhibits offered in support of that motion for summary decision. Even though such a motion was not offered in a traditional form, I find that this case presents a situation where substance must prevails over form. In doing so, I note I cannot adequately consider the merits of this claim on remand regarding judicial and collateral estoppel as directed by the Board without considering these exhibits.

Furthermore, I am not persuaded by the Employer's rather belated claim of unfair prejudice. The Claimant's supplemental exhibits were offered into the record in early August 2001, over one full month before expiration of the original 60-day order. As such, the Employer had ample opportunity to review the exhibits offered by the Claimant and respond with appropriate rebuttal evidence of its own.

I have reviewed all of the documents offered in the exhibit supplement and considered the Employer's claim they violate §18.48. Many of these records are copies of pleadings, answers, motions, etc. from earlier legal proceedings involving this Employer and this Claimant. The Employer is correct in that a number of these copies do contain handwritten notes that were apparently not part of the originals[3]. The sole objection of the Employer appears to be leveled at these handwritten additions and, as such, the Employer seeks to strike such document()from the record. However, I find that this is not a situation where I must throw out the proverbial baby with the bath water. With the exception of the handwritten additions, these documents satisfy all other elements of §18.48. Therefore, in the interest of fairness and to assist me in carrying out the directives of the Board, I find that the handwritten notations on the documents in question are hereby stricken from the record

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[3] Specifically, I note handwritten notations on the following exhibits: B (the Withdrawal of Claim Memorandum, Michigan Department of Labor); C (Claimant's Complaint filed with the Saginaw, Michigan Circuit Court); E (pre-trial questionnaire form of Saginaw, Michigan Circuit Court); F (Defendant's Motion for Summary Disposition, filed with Saginaw, Michigan Circuit Court); J (Carrier's response, Michigan Department of Labor); and K (Letter to James Stamper from Counsel for the Employer.

and will not be considered. However, the type written portion of those documents are admitted into the record.

In summary, for the reasons stated above, IT IS ORDERED that the Employer's motion to strike the Claimant's motion for summary disposition is HEREBY DENIED. Furthermore, IT IS HEREBY ORDERED that the following evidence and is hereby received into the record, post-hearing[4]: Claimant's Exhibit B - Withdrawal Memorandum, State of Michigan Bureau of Worker's Disability Compensation (October 31, 1989); Claimant's Exhibit C - Claimant's Jones Act Complaint filed in Michigan State Court (March 5, 1991); Claimant's Exhibit D - Employer's Answer to Claimant's Complaint filed in Michigan State Court (April 23, 1991); Claimant's Exhibit E - Employer's Response to Pre-Trial Questionnaire, filed in Michigan State Court (May 20, 1991); Claimant's Exhibit F - Employer's Motion for Summary Disposition filed in Michigan State Court (January 9, 1992); Affidavit of Employer's Attorney; Notice of Hearing; Brief in Support of the Motion; and Exhibits in Support of the Motion; Claimant's Exhibit G - Transcript of Hearing on Employer's Motion for Summary Disposition before Hon. Patrick M. Meter in Michigan State Circuit Court (February 3, 1992); Claimant's Exhibit H - Michigan State Circuit Court Order Granting Employer's Motion for Summary Disposition (February 14, 1992); Claimant's Exhibit I - Answer of Employer filed with the Michigan Bureau of Worker's Disability Compensation (March 27, 1992); Claimant's Exhibit J - Carrier's Response filed with the Michigan Bureau of Workers' Disability Compensation (March 27, 1992); Claimant's Exhibit K - Letter from Employer's Counsel to Longshore Claims Review Officer for the United States Department of Labor, Mr. James Stamper (June 24, 1992); Claimant's Exhibit L - Claimant's application for leave to Appeal, Michigan Court of Appeals; Brief in Support of the Motion; and Notice of Hearing (August 12, 1993); Claimant's Exhibit M - Affidavit of Judith A. Schornack-Smith, former counsel of Claimant, in support of

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[4] Also offered are Claimant's A, P, Q, R, and S, which are the Board's Decision and Order of August 18, 2000, the undersigned's Decision and Order of April 28, 1998, the undersigned's Order Denying Claimant's Motion for reconsideration, the Board's Order Denying Reconsideration, and the 6th Circuit Court of Appeal's Order Granting the Petitioner's motion to voluntarily dismiss, respectively. These Exhibits are automatically part of the formal record and need not be offered by the Claimant to be considered.

Claimant's application for leave to file Appeal. (August 12, 1993); Claimant's Exhibit N - Employer's Answer in Opposition to Claimant's Application for leave to file late Appeal with the Michigan State Court of Appeals; and Brief in support of the motion (September 13, 1993); and Claimant's Exhibit O - Michigan State Court of Appeals Denial of Claimant's application for delayed appeal (November 5, 1993).

Summary Decision:

Twenty nine C.F.R. Section 18.40 and Rule 56 of the Federal Rules of Civil Procedure provide that summary judgment, also known as summary decision, is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The evidence presented must create a genuine issue of material fact which "may be reasonably resolved in favor of either party," and therefore, "can be resolved only by a finder of fact." Reich v. Scherer Buick Company, 887 F. Supp. 1142, 1146 (C.D. Ill 1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. Matsushita Elec. Indues. Co. Ltd. v. Zenith, 475 U.S. 574 (1986) Furthermore, the fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. Id. If no issues are present, the moving party is entitled to a judgment as a matter of law. If the slightest doubt remains as to the facts, the motion must be denied.

The burden of proof in a motion for summary decision is borne by the party bringing the motion. Because the burden is on the movant, the evidence presented is construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. Nevertheless, when the moving party has carried the burden under Section 56(c) of the Federal Rules of Civil Procedure, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. [5] Id. at 574. Thus, a non-moving party "may not

[5] Section 56(c) of the Federal Rules of Civil Procedure states that judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show,

rest upon mere allegations or denials in his pleadings, [ ] but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, 447 U.S. 242 (1986).

The initial issue the Board has ordered resolved in this remand is whether or not the Act covers the claim in question. The Employer avers that the Claimant is not a Longshoreman, but a Jones Act seaman, and, therefore, relief for his injuries may not be granted by this court. This position, I note, is diametrically different from the position the Employer argued before the Michigan State Circuit Court and Michigan Court of Appeals. The Claimant in this case has made a motion for summary decision asserting that the doctrines of judicial estoppel and/or collateral estoppel bar the Employer from now taking a position before this court on the issue of seaman or Longshoreman inconsistent from its earlier position before the Michigan courts. If one or both of these doctrines apply, then the Employer is bound to its earlier argument that the Claimant is not a seaman (and in doing so implicitly asserting he is a Longshoremen) rendering the issue of coverage of the Act moot.

Judicial Estoppel:

The substantive judicial estoppel issue presented by the Claimant in this motion for summary judgment is a matter of first impression before this court. The Claimant in this case avers that the Michigan Circuit Court order, awarding summary judgment to the Employer and finding the Claimant was not a Jones Act seaman, judicially estopps the Employer from arguing before this court that the Claimant is in fact a Jones Act seaman.

Judicial estoppel is a doctrine of equity. "The concern [of judicial estoppel] is to avoid unfair results and unseemliness." 18 Charles Wright, Arthur Miller & Edward Cooper, Fed. Practice & Proc. §4477 (1981). As the Board noted in Fox v. West State Inc., 31 BRBS 118 (1997)

> Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by

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that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

> taking an incompatible position. Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996) 'It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose' with the courts.' Helfand v. Gerson, 105 F.3d 530, 534 (9th Cir. 1997) (*quoting* Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).

The present case arises within the 6th Circuit. While that Court has never directly decided the specific issue presented by the instant case, a review of 6th Circuit judicial estoppel precedent is necessary to resolve the issues before me. In Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998), the Court reviewed the series of judicial estoppel cases previously decided by it and enumerated the three specific factors that must be present to trigger judicial estoppel. A "party must show his opponent 1.) Took a contrary position; 2.) Under oath in a prior proceeding; and 3.) the prior position was accepted by the court." Id. at 380. (Internal citations omitted) These three factors are consistent with the standard announced by the Board in Fox v. West State Inc., 31 BRBS 118 (1997) and by the U.S. Supreme Court in New Hampshire v. Maine, __U.S.__, 121 S. Ct. 1808 (2001).

The Benefits Review Board has previously addressed the issue of judicial estoppel in Longshore claims in the case of Fox v. West State Inc., supra. While not reaching the issue on the merits, the Board, in dicta, stated that "judicial estoppel is not implicated unless the first forum accepts the ***legal or factual*** determinations alleged to be at odds with the position advanced in the current forum." Id. at 123, citing Masayesva v. Hale, 118 F.3d 1371 (9th Cir 1997).

The United States Supreme Court recently clarified the definition of judicial estoppel in the case of New Hampshire v. Maine, __U.S.__, 121 S. Ct. 1808 (2001). In that the case, the Court stated

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a

> contrary position, especially if it be to the prejudice to the party who has acquiesced in the position formally taken by him. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

Id. at 1814. (internal citations omitted)

Furthermore, in New Hampshire v. Maine, the Court found that while the doctrine may not be reduced to any particular formula, it identified three factors that must be present to apply the doctrine in any particular case.

> First, a party's later position must be 'clearly inconsistent; with its earlier position.' Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'. Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent determinations' and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 1815. (Internal citations omitted)

The court noted specifically, however, that this was not an exhaustive list of factors and that other considerations may be taken into account when applying the doctrine. Id.

There can be little argument that the first prerequisites of Griffith are satisfied in the present case. The Employer clearly took a contrary position to the one it asserts now in the prior proceedings before the courts of the state of Michigan. Whether the judicial acceptance prong of Fox,

Griffith, and New Hampshire v. Maine is satisfied is not so readily apparent. Furthermore, it must be ascertained if now allowing the Employer to assert the "member of the crew" defense would garner them an unfair advantage in this proceeding.

The U.S. Supreme Court and two circuit courts of appeals have addressed whether judicial estoppel prohibits litigation of a Jones Act suit brought subsequent to the litigation of a claim for LHWCA benefits. See Southwest Marine, Inc., v. Gizoni, 502 U.S. 81 (1991); Sharp v. Johnson Bros. Corp., 973 F.2d 423 (5th Cir. 1992); Figueroa v. Campbell Indust., 45 F.3d 311 (9th Cir. 1994).

The 5th Circuit in Sharp, held that the formal award of LHWCA benefits made based upon an administrative law judge's approval of an 8(f) settlement agreement, precluded re-litigation of the Claimant's seaman status in his subsequent Jones Act trial. Sharp, 973 F.2d at 423. Such an approval by the administrative law judge constituted a "formal award." Id. at 426. See also Newkirk v. Keys Offshore, 782 F.2d 499, 50-502 (5th Cir. 1986); Rodriquez v. Compass Shipping Co., 617 F.2d 955, 958-59 (2nd Cir. 1980), *aff'd* 451 U.S 596, 101 S.Ct 1945 (1981). While the LHWCA claim "was never litigated in an adversarial proceeding" . . . the Claimant nonetheless "availed himself of the statutory machinery to bargain for an award and [ ] had the full opportunity to argue for (or against) coverage" of the Act. Sharp, 973 F.2d at 426. The administrative law judge's affirmance of the settlement was a finding of fact based upon all the relevant evidence of record including the Claimant's testimony and the parties' stipulations and settlement agreement. Id.

In finding the approved settlement a "formal award", the 5th Circuit was distinguishing Sharp from the U.S. Supreme Court's decision in Gizoni, where the higher Court held voluntary payment of benefits by the employer pursuant to the LHWCA did not constitute a formal award for purposes of judicial estoppel. Gizoni, 502 U.S. at 81. The Court stated,"[i]t is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA *without a formal award* is not barred from subsequently seeking relief under the Jones Act." Gizoni, 502 U.S. at 493 (internal citations omitted) (emphasis added). "This is so, quite obviously, because the question of coverage has never actually been litigated." Id. at 91.

The 9th Circuit, in Figueroa v. Campbell Indust., 45 F.3d 311 (9th Cir. 1994), found that approval of a settlement agreement by the District Director under the LHWCA did not bar litigation of a later Jones Act claim. The Court reasoned, based on the decision in Gizoni, that the question of coverage under the LHWCA had not been litigated because of the approved settlement Id. at 315.

The difference between the results in Sharp, Figueroa, and Gizoni appears to be that in only the Sharp case there was judicial acceptance of the coverage issue. In approving the settlement agreement, the administrative law judge made a finding of fact that the claim was covered by the LHWCA. In the joint motion for settlement, both parties took the position that the LHWCA applied to the claim. Therefore, there was judicial acceptance of a prior position, i.e. that the claimant was a longshoreman, and judicial estoppel barred the subsequent Jones Act claim. However, in Gizoni, because payments were made voluntarily by the employer, there was no such acceptance by an adjudicatory official. Finally, in Figueroa, there was no specific finding made by the District Director that the claim was covered by the LHWCA. With no judicial acceptance that the Act applied, there could be no estoppel effect.

As stated above, it is clear that the position asserted by the Employer in this case, that the Claimant is not a longshoreman, is inconsistent with the position it took before the courts of the State of Michigan[6]. I also find, for the reasons stated below, that judicial acceptance of that prior position was achieved when the circuit court awarded summary decision.

The present case more clearly fits the mold of Sharp rather than of Gizoni or Figueroa. In deciding any motion for summary decision, a judge necessarily considers legal and factual matters based upon the arguments and evidence of the parties.

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[6] The Employer's assertion that its argument before the circuit court was not that the LHWCA did apply, but simply that the Jones Act did not is "entirely specious" if the dismissal was based on the Claimant's seaman status. Whitford v. Bush Oceanographic Equipment Co., BRB Nos. 99-1183 & 99-1183A, n.6. If the evidence shows that the circuit court granted summary judgment on the basis the Claimant was not a Jones Act seaman, that was tantamount to a finding he was a Longshoreman. Id.

It was the Employer's argument in the Michigan proceeding that the Claimant was not a Jones Act seamen. The Michigan State court, like the administrative law judge in Sharp, made a final decision based upon the arguments and evidence presented by the parties which included evidence and argument relating to the coverage issue. In granting the Employer's motion, the Michigan Circuit Court judicially accepted the Employer's position concerning coverage of the Jones Act. Therefore, I find that judicial estoppel now bars the Employer from arguing an inconsistent position in this case.

The Employer avers in its brief that the requirements of New Hampshire v. Maine are not satisfied by the facts of this case. First, the Employer states that counsel for the Claimant failed to file a brief in opposition to the Employer's motion for summary decision in the circuit court and did not argue against the motion at the hearing addressing that motion. Because there was no open opposition to the motion, the Employer states, "[t]he 'decision' of the circuit court judge was based upon his determination that certain facts were 'undisputed' as opposed to having been established through litigation." Employer's Brief in response to Claimant's motion for summary decision disallowing Employer's "Member of the Crew" defense, at 5. As such, the Employer implies that judicial acceptance of the prior position never occurred.

I find little merit in this argument by the Employer. The failure of the Claimant's counsel to file a brief in opposition to the motion or actively argue against the Employer's motion at the circuit court hearing does not quash judicial acceptance. As the 5th Circuit explained in Sharp, availment of the "statutory machinery" and the "opportunity to argue for (or against)" a position is sufficient. Furthermore, the Claimant's counsel's failure to actively argue against the motion did not result in a situation where the circuit court judge had no other alternative but to grant the motion for summary disposition. As the record of that hearing demonstrates, Judge Meter carefully reviewed the case law cited by the Employer and the factual exhibits offered by the parties. (Cl. Ex. G) Only after that review was the motion granted. As such, judicial acceptance of the Employer's position occurred.

Additionally, the above-cited case law does not require establishment of the facts through actual litigation before judicial acceptance may be said to have occurred. The key to judicial acceptance is not a requirement of actual adversarial

litigation by the parties, but of consideration of the evidence and arguments by the judge. The circuit court's order granting summary judgment after consideration of the evidence and oral arguments by the parties was clearly adjudicatory in nature and therefore, judicial acceptance of the Employer's position.

The Employer also argues in brief that it has not "deliberately chang[ed] positions according to the exigencies of the moment." Employer's brief on "member of the crew" defense, at 5, *citing* New Hampshire v. Maine, 121 S. Ct. at 1814-1815. In support, the Employer states that at the time of the Michigan circuit court proceedings in 1992, the 6th Circuit Court of Appeals holding in Boyd governed the definition of seaman. Subsequent to those proceedings, in 1995, the U.S. Supreme Court issued the Chandris decision which overturned Boyd and conclusively established a new standard for determining who is and who is not a Jones Act seaman. As the law has changed, the Employer avers that their position before this court is not inconsistent with the posture they took before the courts of Michigan. I disagree.

After the Claimant's claim was dismissed by the Michigan Circuit Court, the Claimant filed a second claim for benefits with the Michigan State Worker's Compensation Board. (Cl. Ex. I) In the answer to that complaint, the Employer reversed the position it had taken only a month earlier before the circuit court and argued that the Claimant **was** a Jones Act seamen. (Cl. Ex. I) That the Claimant was a Jones Act seaman argument was again offered in response to the Claimant's LHWCA claim in June 1992. (Cl. Ex. K) However, in August 1993, when the Michigan Court of Appeals took under consideration the Claimant's motion to review the circuit court's order of summary disposition, the Employer switched sides yet again and argued the Claimant was not a Jones Act seaman. These multiple changes in position by the Employer all occurred years before the Supreme Courts ruling in Chandris. Therefore, I find the argument of the Employer that a change in the law resulted in a change of position on the coverage issue is disingenuous given the procedural history of this action.

The Employer next avers that the Claimant would not suffer an unfair advantage if I determined the LHWCA is inapplicable to this claim because alternative avenues of relief are still available to the Claimant. In support of this argument the Employer cites a provision of Chandris where the Court

enunciated that injured workers who fall under neither the Jones Act nor the LHWCA "may still recover under an applicable state workers compensation scheme or, in admiralty, under general maritime torts principles." 515 U.S. 347, 355. The Employer, however, does not give specific examples of what procedure, if any, would be available to the Claimant at this late date. As the Claimant demonstrates in brief, recovery under general maritime law would now require the Claimant prove he was a seaman, the question resolved against him by the Michigan Circuit Court. Furthermore, the statute of limitations for any such action has long since run. Another Jones Act suit may not be brought as it would be barred by res judicata. No evidence has been offered showing another state workers compensation claim would not befall a similar fate.

Finally, the Employer argues granting the motion for summary disposition on judicial estoppel grounds would "usurp the ultimate fact finding responsibility of the administrative law judge," as the seaman issue as never truly been litigated. For the reasons discussed above, the seaman issue has been litigated in the Michigan Circuit Court as required by the doctrine of judicial estoppel, and therefore, the Employer's argument is without merit.

In summary, I find that the doctrine of judicial estoppel bars the Employer from now taking a position inconsistent from the one it argued before the Michigan courts and asserting before me that the Claimant is a "member of the crew". The Claimant's motion for summary decision disallowing the "member of the crew" defense on the basis of judicial estoppel is HEREBY GRANTED.

Collateral Estoppel:

The Claimant has also filed a motion in this case seeking to bar the Employer's "member of the crew" defense on the grounds of collateral estoppel. Without going into the merits of either party's argument on this issue, I note that collateral estoppel cannot be applied in this matter. The United States Supreme Court has clearly enunciated that collateral estoppel will not bar the re-litigation of an issue in a subsequent proceeding when the controlling legal principles governing that issue have significantly changed since the initial proceeding. See Montana v. United States, 440 U.S. 147, 159 (1979); see also Commissioner v. Sunnen, 333 U.S. 591 (1948). As stated above, the issue of "seaman" was governed by the 6th Circuit's decision

in Boyd at the time of the Michigan Circuit Court's grant of summary judgment. Subsequently, Chandris was issued by the U.S. Supreme Court, clarifying the definition of "seaman". As, the Chandris decision has significantly altered the controlling legal principles since the Michigan Circuit Court ruling, collateral estoppel cannot be applied in this case. THEREFORE, IT IS HEREBY ORDERED that, the Claimant's motion for summary decision disallowing the "member of the crew" defense based upon collateral estoppel is DENIED.

My finding and rationale that collateral estoppel does not apply in this case is not inconsistent with my finding that judicial estoppel does bar the Employer's defense. While a change in law clearly prohibits application of collateral estoppel, no case, cited by the parties, stands for the proposition that a change in law specifically bars application of judicial estoppel. Furthermore, I note that the application of judicial estoppel is less likely to create an unfair hardship for a party than the doctrine of collateral estoppel. Judicial estoppel is, by nature, a doctrine of fundamental fairness. Because judicial estoppel requires judicial acceptance of a prior position of a party, at worst, that party is held to an earlier argument it chose to make. Collateral estoppel, on the other hand, binds a party to findings of fact and law made by the earlier court. These findings by the prior court may not be the positions advocated by the party sought to be estopped in a subsequent proceeding. This is why the doctrine of collateral estoppel must be carefully applied.

I have found that judicial estoppel applies in this case barring the Employer from asserting the "member of the crew" defense. As the Board noted, the Michigan Circuit Court's grant of summary judgment on the basis the Claimant was not a seaman, was tantamount to finding the Claimant was an employee under the LHWCA. That finding is not, however, entitled to collateral estoppel effect in this action because the decision of the United States Supreme Court in Chandris affected a significant change in the law so precluding application of collateral estoppel. Nevertheless, judicial estoppel requires the Employer be held to its earlier implicit contention before the circuit court that the claim is covered by the LHWCA. As the Employer is precluded from further litigating the seaman/longshoreman issue, I find that this claim for benefits is covered by the LHWCA.

Average Weekly Wage:

In my previous Decision and Order, I determined that the Claimant's average weekly wage must be calculated pursuant to §10(c) of the Act. This determination was based upon my finding that the Claimant's longshore work was seasonal, thus excluding calculation of average weekly wage pursuant to §§10(a) or (b). Noting that no evidence was presented by the Claimant reflecting length of employment during the winter of 1988, I determined the Claimant earned $5.00 per hour for three weeks of work as a longshoreman in February 1989. Furthermore, I determined that the Claimant would have worked an additional four weeks as a longshoreman had he not been injured in March 1989. Thus, I credited the Claimant with seven weeks employment as a longshoreman at a rate of $5.00 per hour resulting in an average annual earning capacity as a longshoreman of $1,400.00.[7] In accordance with §10(d) of the Act, I found the Claimant's average weekly wage was $26.92.

The Board, finding that $1,400.00 did not fairly represent the Claimant'S annual earning capacity, has remanded my calculations for further consideration. Specifically, the Board determined that under §10(c), I must determine the Claimant's annual earning capacity and then divide this figure by 52, as required by §10(d). I may arrive at the Claimant's annual earning capacity by dividing the actual earnings by the actual days or weeks worked, or use the actual hourly rate, and then extrapolate that figure over the entire year.

Included with the brief in support of the Claimant's motion for recalculation of the average weekly wage are payroll records of the Employer showing the Claimant's earnings from August 10, 1987, through December 12, 1988. These records indicate that from May 15, 1988, through December 12, 1988 (24 weeks), the Claimant earned $7,700.00. Assuming an earning's year from March 1988 through March 1989, and adding that $7,700.00 to the $1,400.00 I determined the Claimant earned and would have earned had he not been injured (7 weeks), I find that the Claimant's total earnings for 31 weeks was $9,100.00. Extrapolated over

[7] This figure was calculated by multiplying $5.00 per hour times 40 hours per week times seven weeks of winter longshore work.

the full year, this yields an annual earning capacity of $15,264.51,[8] resulting in an average weekly wage of $293.55.

Compensation:

Since February 3, 1989, the date of the Claimant's injury, the Claimant has been temporarily totally disabled. The Claimant's average weekly wage has been calculated to total $293.55. Section 8(b) establishes that the compensation the successful claimant receives is 66% of his average weekly wage. In this case, that equals an amount of $195.70. Therefore, as total disability commenced on February 3, 1989, the Claimant is entitled to $195.70 per week from February 3, 1989, until further notice.

Attorney's Fees:

In a supplemental Decision and Order of July 15, 1999, attorney's fees were awarded to the Claimant's counsel in the amount of $31,265.55. The Board, on remand, stated that if I determined the Act did not cover this claim for benefits, then the Employer would not be liable for payment of the Claimant's counsels' fees. However, if I find, as I have, that the Act does cover this claim for benefits and reaffirm an award, then the amount of attorney's fees originally awarded is affirmed by the Board as the Employer never filed an objection to the Claimant's counsel's fee petition.

Additionally, as the Claimant's counsel has been successful in this claim on remand, she is entitled to file a petition for attorney's fees regarding her work before me on this remanded claim. Accordingly, I hereby grant the Claimant's counsel 30 days from the date of this Decision and Order for the submission of a complete application for attorney's fees and costs. The application shall be prepared in strict accordance with 20 C.F.R. §§725.365 and 725.366. The application must be served on all parties, including the Claimant, and proof of service must be filed with the application. The parties are granted 30 days following service of the application to file objections to the application for attorney's fees.

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[8] This extrapolated amount was calculated by multiplying 52 weeks per year by the $9,100.00 actually earned and then dividing the resulting amount by the 31 weeks actually worked.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that the Claimant is entitled to the below-listed compensation as a result of the claim involved in this proceeding. The specific computations of the compensation shall be administratively performed by the District Director.

1. The Employer, Busch Oceanographic Equipment Co., shall pay James Whitford compensation under 33 U.S.C. § 908(c) for temporary total disability from February 3, 1989 (the date of the Claimant's injury) until further notice at the rate of $195.70 per week based on an average weekly wage of $293.55.

2. The Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

3. The Employer shall pay all reasonable, appropriate and necessary medical expenses arising from the Claimant's temporary total disability, pursuant to the provisions of §7 of the Act.

4. The Claimant's attorney shall file, within thirty days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to the Employer's counsel who shall have thirty days to file objections. 20 C.F.R. § 702.132.

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DANIEL J. ROKETENETZ
Administrative Law Judge